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13 Attorneys for Plaintiff Diane Lowery

14 IN THE UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

17 C 07 2663
 Case No. EDL

18 DIANE LOWERY, *individually and*
 19 *on behalf of a class of similarly situated persons*

20 Plaintiff, CLASS ACTION COMPLAINT

21 VS.

22 MENU FOODS INCOME FUND;
 23 MENU FOODS LIMITED PARTNERSHIP;
 MENU FOODS MIDWEST CORP.;
 24 MENU FOODS SOUTH DAKOTA;
 MENU FOODS, INC.; MENU FOODS
 HOLDINGS, INC.

26 Defendants.

27 DEMAND FOR JURY TRIAL

28 Complaint

1 Plaintiff Diane Lowery ("Plaintiff"), individually and on behalf of all others similarly
2 situated, files this Class Action Complaint (the "Complaint") against Menu Foods Income Fund,
3 Menu Foods Limited Partnership, Menu Foods Midwest Corp., Menu Foods South Dakota,
4 Menu Foods, Inc., and Menu Foods Holdings, Inc. (collectively "Menu Foods" and/or
5 "Defendants"). Plaintiff, upon both personal knowledge and information and belief and upon the
6 investigation made by her attorneys, hereby alleges as follows:

7

INTRODUCTION

8

9 1. This is a nationwide class action lawsuit brought on behalf of Plaintiff and other
10 similarly situated individuals who purchased contaminated pet food products (the "Products")
11 produced, manufactured, distributed, and/or sold by Defendants and who were accordingly
12 damaged thereby. The Products were marketed and sold under various brand names.

13

14 2. Menu Foods is one of the nation's leading manufacturers of pet food sold by
15 retailers, pet specialty stores, and other wholesale and retail outlets including Wal-Mart,
16 Safeway, Kroger, Petco, and PetSmart Inc.

17

18 3. Menu Foods developed, manufactured, marketed, advertised, and warranted their
19 Products as safe and fit for the ordinary purpose for which they were used, *i.e.* household pet
20 consumption, free of defects. Menu Foods intended to, and did, place the Products in the stream
21 of commerce to be sold to Plaintiff and other pet owners in California and throughout the United
22 States.

23

24 4. These Products have proven to be unreasonably and dangerously contaminated
25 and are therefore defective. Indeed, Menu Foods has admitted that the Products are not only
26 defective but potentially poisonous. As a result of having purchased these defective and
27 potentially poisonous Products negligently manufactured and/or sold by the Defendants, Plaintiff

1 and the members of the Class have unnecessarily suffered damages including expensive
2 veterinary bills, loss of pets (including the costs associated with putting the animal to sleep
3 and/or burial services), and the purchase price of the Products which they would have never
4 bought had they known they were defective.
5

6 **PARTIES**

7 5. Plaintiff Diane Lowery is a resident of Richmond, California. Plaintiff's cat
8 suffered extreme illness and death due to the cat's ingestion of contaminated food produced,
9 distributed, marketed, and sold by the Defendants. Plaintiff brings this action, pursuant to Rule
10 23 of the Federal Rules of Civil Procedure, on her own behalf and as a representative of a class
11 of persons consisting of all persons in the United States who purchased and/or incurred damages
12 (medical and other expenses) by using the Products produced, manufactured, distributed, and/or
13 sold by the Defendants and later recalled.
14

15 6. Defendant Menu Foods Income Fund is an unincorporated open-ended trust
16 established under the laws of the Province Ontario, Canada. Its principal place of business is
17 also Ontario. The Income Fund controls, directly or indirectly, the other Menu Foods
18 Defendants engaged in the manufacture and distribution of pet food products.
19

20 7. Defendant Menu Foods Midwest Corp. is a Delaware corporation. It is the
21 corporation most closely affiliated with the Income Fund for their operations conducted in the
22 United States.
23

24 8. Defendant Menu Foods South Dakota, Inc. is a Delaware Corporation and a
25 wholly owned subsidiary of Defendant Menu Foods Income Fund.
26

27 9. Defendant Menu Foods Holdings, Inc. is a Delaware Corporation and a wholly
28 owned subsidiary of Defendant Menu Foods Income Fund.
29

10. Defendant Menu Foods Limited Partnership is an entity registered in Delaware and a wholly owned subsidiary of Defendant Menu Foods Income Fund.

11. Defendant Menu Foods, Inc. is a New Jersey Corporation and a wholly owned subsidiary of Defendant Menu Foods Income Fund.

12. Menu Foods manufactures and sells pet food products to retail customers and brand owners throughout North America. Menu Foods owns Kansas and New Jersey manufacturing plants that produced the Products now subject to recall.

JURISDICTION AND VENUE

13. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1332(d). The Class involves more than 100 individuals. A member of the Class is a citizen of a state different from the Defendants, and the amount of controversy, in the aggregate, exceeds the sum of \$5,000,000.00 exclusive of interest and costs.

14. Venue is proper in this district under 28 U.S.C. §1391. Defendants market and sale products here, and have availed themselves to the laws and protection of the State of California.

FACTS

15. Defendants claim to be "the leading North American private-label/contract manufacturer of pet food products sold by supermarket retailers, mass merchandisers, pet specialty retailers, and other ritual and wholesale outlets." They hold themselves out to the public as a manufacturer of safe, nutritious, and high-quality dog and cat food.

16. On February 20, 2007, Menu Foods received its first six complaints concerning kidney failure occurrences in pets which had eaten contaminated and recalled Products.

1 17. On February 27, 2007, as a part of its quarterly feeding trials, Menu Foods fed
2 samples of their contaminated and recalled Products to 40-50 cats and dogs. By March 2, the
3 first of 9 animals in Menu Foods feeding trial died of acute renal failure.
4

5 18. By March 6th, 2007, Menu Foods had determined that many of their pet food
6 Products were indeed contaminated and they also had determined the likely source of the
7 contamination. Menu Foods determined that the contamination problem stemmed from a tainted
8 wheat gluten supply that they had received from a new foreign supplier. The wheat gluten
9 supply contained aminopterin and/or melamine, two substances which are foreign to pet food,
10 which would not be expected by a reasonable person to be present in pet food, and which may be
11 toxic when ingested.
12

13 19. On March 6th, 2007, Menu Foods took its first action concerning the possible
14 contamination by switching its supplier of wheat gluten.
15

16 20. However, not until 10 days later, on March 16, 2007, did Menu Foods inform the
17 public of their contamination problem. On that day, Menu Foods announced a recall of several
18 of its wet pet food Products, which included approximately 42 brands of "cuts and gravy" style
19 dog food and 51 brands of "cuts and gravy" style cat food, all produced at Menu Food's facilities
20 in Emporia, Kansas and Pennsauken, New Jersey between December 3, 2006 and March 6, 2007.
21

22 21. Up until the March 16, 2007, Recall, Menu Foods did nothing to prevent the
23 distribution of the contaminated pet food Products despite their knowledge of the very real
24 problems associated with the wheat gluten contamination for approximately three weeks.
25 Indeed, Defendants knew of the potential for contamination no later than February 20, 2007 and
26 were conducting an internal investigation by February 27. By March 6, Defendants had
27 discovered the likely source of the problem and corrected that issue 10 days prior to announcing
28

1 the recall. After March 6 and prior to the recall, Defendants continued to maintain their silence,
2 as they – according to their own announcement – conducted “a substantial battery of technical
3 tests, conducted by both internal and external specialists.”
4

5 22. Defendants knew about the potential problems with their Products and should
6 have notified the public long before when they actually did. Indeed, Menu Foods still did not
7 announce a recall or inform the public about the contaminated pet food Products until its largest
8 institutional customer, which accounted for approximately 11% of Menu Food’s revenue,
9 indicated that it would initiate *its own recall* of Menu Food’s products, and place all of its future
10 orders on “hold.” Faced with having one of its own customers announce a recall; Menu Foods
11 finally made its announcement on March 16, 2007. This action, or lack thereof, permitted and
12 caused additional harm to thousands of pet owners in California and throughout the United
13 States.
14

15 23. The reason for Menu Food’s silence is clear. After the recall was announced on
16 March 16, 2007, Menu Food’s stock MEW.UN dropped 45% by the close of trading day.
17

18 24. Since Menu Food’s recall, the problem has only gotten worse. Three other pet
19 food manufacturers have issued their own recalls and the U.S. Food and Drug Administration, as
20 of April 3, 2007, has stated that they can not definitely rule out more recalls in the near future.
21

22 25. Defendants, directly, or through their agents, ostensible agents and/or co-
23 conspirators, by selling the Products as pet food, implicitly and explicitly represented that the
24 Products were fit for consumption by pets, and would not result in the death and/or serious
25 illness of the pets that consume the purportedly safe food. Indeed, as evidenced by numerous
26 press releases, Defendants continued to directly and explicitly represent through overt and
27

1 unambiguous statements that the Products were fit for consumption by pets, and will not result in
2 the death and serious illness of the pets that consume the purported food.
3

4 26. Aside from the aforementioned press releases, Defendants have also made
5 representations, including on product labeling and otherwise in print materials and in other
6 marketing and promotional materials, concerning the quality of their products, including explicit
7 and implicit representations that the Products were suitable for consumption by pets. Defendants
8 ultimately make billions of dollars in revenue a year from companies who sell the Products at
9 retail level. Accordingly, Defendants keep themselves apprised of the advertising, promotions,
10 marketing and claims that are made on behalf of the Products. On information and belief,
11 Defendants coordinate with the companies who brand the product at the retail level, concerning
12 the claims made about the quality of Defendants' product, including the Products.
13

14 27. Plaintiff owned a cat that was a very healthy middle aged cat named "Cupcake."
15 Plaintiff's cat ingested defective recalled pet food Products which were produced by Menu
16 Foods. At the time Plaintiff fed her cat the defective Products, she did not know nor had reason
17 to know that they were potentially defective and deadly.
18

19 28. Beginning around late February and early March, 2007, Plaintiff noticed that
20 Cupcake was acting differently and had begun to lose weight. Cupcake died on or about March
21 2, 2007. Lab tests revealed that Cupcake had an elevated blood urea nitrogen (Bun) level of 124
22 compared to the recommended levels of 15-34. Creatinine levels were 3.6 compared to the
23 recommended levels of .8-2.3. These tests are used to evaluate kidney functions. Increased
24 levels indicate impaired kidney function, an affliction now known to be caused by the tainted pet
25 food supplied by Defendants and ingested by Plaintiff's cat.
26
27

CLASS ACTION ALLEGATIONS

29. Plaintiff brings her class action claim pursuant to Rule 23 of the Federal Rules of Civil Procedure. The requirements of Rule 23 are met with respect to the class defined below.

30. Plaintiff brings her claims on her own behalf, and on behalf of the following Class:

All persons in the United States who purchased and/or, incurred damages by using (including medical and other expenses), pet food products produced, manufactured, distributed, and/or sold by the Defendants and later recalled.

31. Plaintiff reserves the right to amend or modify her Complaint and/or the Class definition in connection with meaningful discovery and/or a Motion for Class Certification.

32. This class action is properly brought as a class action for the following reasons. The Class is so numerous that joinder of the individual members of the proposed Class is impracticable. The Class, upon information and belief, includes thousands if not hundreds of thousands of individuals geographically dispersed throughout the United States. The precise number and identities of Class members are unknown to Plaintiff but can be easily obtained through notice and discovery. Plaintiff does not anticipate any difficulties in the management of this action as a class action. The Class is ascertainable and there is a well-defined community of interests in the questions of law and/or fact alleged since the rights of each Class member were infringed or violated in a similar fashion based upon the Defendants' misconduct. Notice can be provided through publication, the cost of which is properly imposed upon the Defendants.

33. Questions of law or fact common to the Class exist as to Plaintiff and all Class members, and these common questions predominate over any questions affecting only individual members of the Class. Among the common questions of law and/or fact are the following.

Complaint

- a. Whether Defendants were negligent in allowing pet food Products in the United States to be contaminated with a dangerous ingredient(s) that was not safe for consumption;
- b. Whether Defendants owed a duty to pet owners by ensuring that the pet food Products were not contaminated with dangerous ingredients;
- c. Whether Defendants' conduct amounted to a breach of that duty;
- d. Whether Defendants' conduct was a proximate cause of Plaintiff's and the Class members' damages;
- e. Whether Defendants are responsible for the contamination of the pet food Products;
- f. Whether Defendants' representations, omissions, and conduct regarding their pet food Products were misleading or false;
- g. Whether Defendants' representations and conduct were likely to deceive consumers into believing that the pet food Products were safe for the purposes for which they were sold;
- h. When Defendants knew or should have known the pet food Products were defective;
- i. When Defendants knew or should have known the pet food products had the potential to be defective;
- j. Whether Defendants refused to disclose their knowledge of potential problems associated with the pet food products after they knew of the Products' propensity to harm pets;
- k. Whether the propensity of the pet food Products to harm pets constitutes a manufacturing defect or design;
- l. Whether Defendants' conduct constitutes a breach of warranty;
- m. Whether Defendants were negligent per se;
- n. Whether Defendants are strictly liable;
- o. Whether members of the Class have been injured by the Defendants conduct;
- p. Whether members of the Class have sustained damages and are entitled to restitution as a result of Defendants wrongdoing and, if so, what is the

Complaint

1 proper measure and appropriate formula to be applied in determining such
2 damages and restitution; and

3 q. Whether members of the Class are entitled to injunctive relief.

4 34. Defendants engaged in a common course of conduct giving rise to the legal rights
5 sought to be enforced by Plaintiff and the Class members. Individual questions, if any, pale by
6 comparison to the numerous common questions that predominate.

7 35. The injuries sustained by Plaintiff and the Class members flow, in each instance,
8 from a common nucleus of operative facts – the Defendants' wrongdoing. In every related case,
9 Plaintiff and the Class members suffered damages caused by their purchase of defective pet food
10 products produced, manufactured, distributed, and/or sold by the Defendants which were later
11 recalled.

12 36. Plaintiff's claims are typical of the claims of the Class members. As particularly
13 described herein, Plaintiff suffered economic loss caused by the Defendants in a manner similar
14 to all of the other Class members. Therefore, Plaintiff's claims are typical of the Class.
15 Moreover, the defenses, if any, that will be asserted against Plaintiff's claims are typical of the
16 defenses that will be asserted, if any, against the Class members' claims.

17 37. Plaintiff will fairly and adequately protect the interests of the Class members.
18 Plaintiff has no interests adverse to the interests of the Class members and has retained counsel
19 with significant experience in the prosecution of class actions and complex litigation, including
20 consumer protection litigation, and who will vigorously prosecute this action.

21 38. A class action is superior to other available methods for the fair and efficient
22 adjudication of this controversy, and individual joinder of all members of the Class is
23 impracticable, if not impossible because the Class members are scattered throughout the United
24 States.

1 States. Moreover, the cost to the court system of such individualized litigation would be
2 substantial given the comparatively small amounts of individual damages we are dealing with
3 here. Individualized litigation would likewise present the potential for inconsistent or
4 contradictory judgments and would result in significant delay and expense to all parties and
5 multiple courts hearing virtually identical lawsuits. By contrast, the conduct of this action as a
6 class action presents fewer management difficulties, conserves the resources of the parties and
7 the court, protects the rights of each Class member and maximizes recovery for them.
8

9 39. Plaintiff knows of no difficulties that will be encountered in the management of
10 this litigation that would preclude its maintenance as a class action.

12 40. Defendants have acted or have refused to act on grounds generally applicable to
13 the Class thereby making it appropriate to grant final declaratory and injunctive relief with
14 respect to the Class as a whole.
15

CAUSES OF ACTION

COUNT I: STRICT PRODUCTS LIABILITY – DEFECT IN DESIGN OR MANUFACTURE

19 41. Plaintiff incorporates by reference all of the foregoing paragraphs as if set forth
20 herein.

21 42. Defendants, as commercial suppliers of pet food Products, have an absolute duty
22 to refrain from placing into the stream of commerce an unreasonably dangerous product that is
23 not fit for consumption or use and which can cause injury to person or property.
24

25 43. Defendants breached that duty by placing into the stream of commerce an
26 unreasonably dangerous product that is not fit for consumption or use and which has caused
27
28

injury to both persons and property. These products were unreasonably dangerous because they contained manufacturing and/or design defects.

44. The unreasonably dangerous products Defendants placed into the stream of commerce reached consumers such as Plaintiff and the Class members without substantial change in the condition in which they were supplied.

45. Plaintiff and the Class members were reasonably foreseeable users of the unreasonably dangerous products and used these unreasonably dangerous products in a foreseeable manner. As a result, they have suffered significant damages caused directly and proximately by their use of Defendants' unreasonably dangerous products including losses associated with the death of his pet as well as expenditures of money.

COUNT II: STRICT PRODUCTS LIABILITY – FAILURE TO WARN

46. Plaintiff incorporates by reference all of the foregoing paragraphs as if set forth herein.

47. Defendants placed into the stream of commerce an unreasonably dangerous product that is not fit for consumption or use and which can cause injury to person or property.

48. Simultaneously, Defendants also failed to warn the reasonably foreseeable users of their products, including Plaintiff and the Class members, of the known dangers associated with their unreasonably dangerous products despite their well-documented knowledge. Even after Defendants became aware of the dangerous contamination of pet food, they still refused to warn the consumers and allowed countless other consumers to purchase the contaminated pet food products.

49. As a direct and proximate result of Defendants' actions, Plaintiff and the Class members have suffered significant damages.

COUNT III: NEGLIGENCE

50. Plaintiff incorporates by reference all of the foregoing paragraphs as if set forth herein.

51. Defendants owed a duty of care to Plaintiff, the Class members, and general public to ensure that its pet food products did not contain toxic or otherwise unreasonably dangerous ingredients.

52. Defendants breached that duty by producing, manufacturing, distributing, and/or selling pet food products to Plaintiff and Class members which did indeed contain toxic or otherwise unreasonably dangerous ingredients.

53. Additionally, Defendants breached their duty of care to Plaintiff and the Class members by failing to use sufficient quality control, perform adequate testing, and failing to take sufficient measures to prevent the products from continuing to be offered for sale, sale, or fed to pets, despite their knowledge of their products dangerous condition.

54. Defendants' breaches of duty directly and proximately caused significant damage to Plaintiff and the Class.

COUNT IV: NEGLIGENCE PER SE

55. Plaintiff incorporates by reference all of the foregoing paragraphs as if set forth herein.

56. Defendants also had a duty to ensure that their pet food products was produced, transported, marketed, distributed, and sold in a manner consistent with government regulations.

57. Defendants breached this duty in violation of regulatory standards.

58. Such breaches directly and proximately caused significant damages to Plaintiff.

and the Class.

JURY TRIAL DEMANDED

59. Plaintiff and the Class demand a jury of twelve.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, requests that she and the other applicable Class members have judgment entered in their favor and against Defendants, as follows:

- A. An order certifying that this action, involving Plaintiff's and the Class members' claims be maintained as a nationwide class action under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiff and his undersigned counsel to represent the Class;
 - B. An award of actual damages including medical and other out-of pocket expenses;
 - C. Appropriate injunctive relief;
 - D. Reasonable attorneys' fees and costs; and
 - E. Such further appropriate relief this Court deems necessary.

DATED: May 18, 2007

EMERSON POYNTER LLP

By: Robert C. Dippinger

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Complaint

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